DATE: April 28, 1995

CASE NO.: 94-INA-00062

In the Matter of:

ARMSTRONG LABELING SYSTEM,
Employer

On Behalf of:

HEERAMAN HARRY,
Alien

Appearance: David Scheinfeld, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 17, 1992, Armstrong Labeling System ("Employer") filed an application for labor certification to enable Heeraman Harry ("Alien") to fill the position of Coupon Press Operator (AF 13). The job duties for the position are:

> Print pressure sensitive labels and coupons. Make photo polymer printing plates from films and mount on various repeat cylinders. Combine multiple webs of different films and foils all printing and collating in register. Apply emulsions in register as well as a pressure sensitive film lamination. Simultaneously must monitor Kis Cut die cutting register. Remove waste from furnished labels which are then wound into rolls.

The requirement for the position is one year of experience in the job offered or one year of experience in the related occupation of assistant press operator.

The CO issued a Notice of Findings on April 6, 1993 (AF 39), proposing to deny certification on the grounds that the Employer failed to adequately document appropriate posting of the notice of the job opportunity in violation of 20 C.F.R. § 656.20(g)(3), and failed to adequately document the rejection of three U.S. applicants for lawful, job-related reasons in violation of § 656.21(b)(6).

Accordingly, the Employer was notified that it had until May 11, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 11, 1993 (AF 45), the Employer contended that it rejected the three U.S. applicants in question for failure to have sufficient experience with printing "pressure sensitive labels and coupons" on web flexographic presses.

The CO issued the Final Determination on June 3, 1993 (AF 48), denying certification because the Employer failed to adequately document that the three U.S. applicants were rejected for lawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6).

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On July 6, 1993, the Employer requested review of the Denial of Labor Certification (AF 55). On November 9, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The regulations provide in § 656.21(b)(6) that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. Furthermore, although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. applicants who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In this case, three U.S. applicants met the Employer's alternative requirement, with each having more than the one year of related experience as an assistant press operator. The Employer argues that the three U.S. workers were lawfully rejected for the job-related reason that they did not have sufficient experience running the Employer's particular type of printing presses, "web flexographic presses." The requirement of experience operating a web flexographic press was not stated in the ETA 750 application, the job posting, or the newspaper ads.

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Cafe*, 90-INA-26 (Jan. 25, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988). Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterier*, 93-INA-44 (Dec. 7, 1993); *State of California, Board of Equalization*, 93-INA-42 (Dec. 7, 1993).

In rebuttal, the Employer describes at length the complicated process of the web flexographic presses, and notes how companies that have switched from sheet-fed presses have had to retrain their entire press crews because the two types of presses are so different (AF 43). If this knowledge is so critical to the position, it clearly should have been cited as a requirement of the position, especially when the Employer states that it does not have the manpower to train any

individuals on these specialized presses (AF 55).[2] The record clearly shows that the requirement of experience operating web flexographic presses was not stated in the application, posting, or newspaper ads. The record also clearly shows that the U.S. applicants, Joel Nadler, John Kim, and Douglas Allan, all had much more than one year of experience as an assistant press operator, thus meeting and surpassing the alternative requirement. Consequently, the Employer's rejection of these U.S. workers who meet the alternative requirement is unlawful. See *Champion Services, Inc.*, 93-INA-46 (Dec. 15, 1993); *Pro Parts, Inc.*, 92-INA-289 (July 19, 1993).

We find that the Employer has failed to sufficiently establish that the three U.S. applicants were rejected for lawful, job-related reasons.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.

[2] Perhaps the fact that the Alien did not have any experience with the web flexographic presses prior to his hire by the Employer was a factor in the decision not to require such specific experience (AF 10).